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Attorneys for Plaintiff

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION

UNITED STATES OF AMERICA, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
MARVIN NELSON, )  
 )  
Defendant. )

No. CR 07-00364 CW

SUPPLEMENTAL SENTENCING  
MEMORANDUM

Date: July 9, 2008  
Time: 2:30 p.m.  
Judge: Honorable Claudia Wilken

SUPPLEMENTAL SENTENCING MEMORANDUM  
CR 07-00364 CW

1 **I. INTRODUCTION**

2 The government filed its Sentencing Memorandum on July 2, 2008, and the defense filed  
3 its Sentencing Memorandum on July 7, 2008. The following Supplemental Sentencing  
4 Memorandum by the government responds to some of the issues raised by the defendant's  
5 memorandum.

6  
7 **II. DISCUSSION**

8 **A. The Defendant's Actions Were Not Passive**

9 The government disagrees with the characterization of the defendant's crime as passive.  
10 The indictment in this case arose out of the defendant's conduct over an 18 year period, during  
11 which he knowingly converted to his use approximately \$132,968.68 in federal benefits payable  
12 to his mother. The defendant's conduct involved several active aspects. After his mother died,  
13 the defendant opened a joint checking account in his deceased mother's name, using her social  
14 security number. Month after month, from February 1989 through January 2007, the defendant  
15 forged his mother's signature on the benefit checks, deposited them into the joint bank account  
16 he had fraudulently opened, and used the money. The defendant changed the address for his  
17 deceased mother 3 times over the course of this continuing fraudulent scheme to correspond with  
18 his own personal address changes.

19  
20 **B. A Departure for Childhood Abuse or Diminished Capacity Is Not**  
21 **Appropriate**

22 The cases that the defendant cites in support of his request for an adjustment for  
23 childhood abuse and diminished capacity all involve situations in which the abuse or diminished  
24 capacity caused the offense behavior. The defendant relies upon United States v. Cantu, 12 F.3d  
25 1506 (9<sup>th</sup> Cir. 1993), in which a defendant's post traumatic stress disorder following his  
26 experience as a Vietnam veteran caused him to fixate on weapons and to engage in the offense  
27 conduct of his felon in possession case. The defendant also relies upon United States v.  
28 Lewinson, 988 F.2d 1005 (9<sup>th</sup> Cir. 1993), in which there was clear and uncontroverted evidence

1 that the defendant suffered from an impaired mental capacity at the time of the offense. In  
2 Lewinson, the medical reports established that Lewinson's "conduct at the time of the offenses  
3 was directly related to psychological problems," and that Lewinson's psychological problems  
4 were the "most highly significant factors in [Lewinson's] behavior and decision-making during  
5 the offense period." Lewinson, 988 F.2d at 1006.

6 The defendant also cites Caro v. Woodford, 280 F.3d 1247 (9<sup>th</sup> Cir. 2002), which  
7 involved a murder defendant who, according to medical experts, suffered chemical brain damage  
8 that caused him to have irrational aggressiveness. Similarly, in United States v. Menyweather,  
9 447 F.3d 625 (9<sup>th</sup> Cir. 2006), a forensic psychologist opined that the defendant's theft offense  
10 was part of a "manic denial of psychotic trauma accompanied by compulsive coping behaviors."  
11 Menyweather, 447 F.3d at 628. In United States v. Roe, 976 F.2d 1216 (9<sup>th</sup> Cir. 1992), a medical  
12 expert testified that the defendant was rendered "virtually a mindless puppet" by his mental  
13 problems. Roe, 976 F.2d at 218. Similarly, United States v. Walter, 256 F.3d 891 (9<sup>th</sup> Cir.  
14 2001), involved an expert psychological evaluation establishing that the defendant's "emotional  
15 difficulties influenced his decision to commit [the] crime." Walter, 256 F.3d at 894. The  
16 defendant also cites United States v. Rivera, 192 F.3d 81 (9<sup>th</sup> Cir. 1999), in which the Court  
17 declined to grant a defendant a departure for extreme childhood abuse, reasoning that "childhood  
18 abuse and neglect are often present in the lives of criminals." Riviera, 192 F.3d at 86.

19 In the present case, the defendant's alleged medical problems and childhood abuse did  
20 not contribute to the commission of the offense. Indeed, Dr. Eliason's report specifically states  
21 that it is more likely that the defendant committed the instant crime for reasons unrelated to his  
22 childhood abuse or his ambivalent relationship with his mother. See Eliason Report, p. 2. In  
23 order to qualify for a departure for diminished capacity, the defendant's reduced capacity must  
24 contribute to the commission of the offense. See U.S.S.G. § 5K1.13; United States v. Smith, 330  
25 F.3d at 1209; United States v. Davis, 264 F.3d at 813; United States v. Borrayo, 898 F.2d at 91.  
26 As the defendant's conduct was not caused by his childhood experiences or his mental condition,  
27 a departure is not appropriate.

**C. Ability to Pay Restitution Is Not a Basis to Depart Downward to Facilitate Payment**

During his 18 years of fraud, the defendant converted \$132,968.68 to his use. In the plea agreement, the defendant agreed to liquidate his 401(k) account that he represents has a balance of stocks and cash valued at approximately \$119,000, and agreed to pay the proceeds, net of taxes and penalties (if any) for early withdrawal. On December 18, 2007, the defendant submitted a cashier's check for \$23,000 toward his restitution. On July 3, 2008, the defendant submitted a personal check from Kristi L. Nelson for \$28,000 toward the defendant's restitution. Thus, the total amount paid on his behalf to date is \$51,000 – less than half of the money that the defendant converted to his use.

In his Sentencing Memorandum, the defendant requests that he be sentenced to probation instead of custody so that he can find a job and work to pay restitution. This would not be an appropriate basis to award a lower sentence. Restitution is not a legitimate ground for awarding a lower sentence. See United States v. Chastin, 84 F.3d 321 (9<sup>th</sup> Cir. 1996). Reducing a defendant's sentence to preserve a defendant's job or to facilitate restitution would introduce socio-economic disparity into sentencing. See id.

**II. CONCLUSION**

For the reasons set forth above and in the government's Sentencing Memorandum filed on July 2, 2008, the government respectfully requests that the Court, taking into consideration the Sentencing Guidelines and the sentencing factors set forth in Section 3553(a), sentence Defendant to 15 months imprisonment, 3 years of supervised release, \$132,968.68 in restitution, and a \$100 special assessment.

JOSEPH P. RUSSONIELLO  
United States Attorney

Dated: July 8, 2008

/s/  
CHINHAYI J. COLEMAN  
Assistant United States Attorney